



# ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 INTERAGENCY PROCEDURES

NHS Highland

The Highland Council

Revised 2025

The Adults with Incapacity (Scotland) Act 2000 sets out the legal framework for regulating intervention in the affairs of adults who may not have the capacity to make important decisions about their finances or welfare. This may be as a result of a mental health problem, learning disability, dementia or inability to communicate. The framework is underpinned by principles which enable interventions to be tailored to the needs of the individual.

This practice guidance aims to support practitioner's understanding of their statutory functions and duties as defined by The Adults with Incapacity (Scotland) Act 2000, Mental Health (Care & Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007. The guidance should be read in conjunction with the updated Code of Practice for Local Authorities exercising functions under the 2000 Act. [AWI Code of Practice for LAs](#)

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## Introduction

The Adults with Incapacity (Scotland) Act 2000 provides for decisions to be made on behalf of adults who lack capacity to do so themselves because of a mental disorder or an inability to communicate. The decisions concerned may be about the Adult's property or financial affairs, or about their welfare, including medical treatment, or both.

The Act provides a legal framework to support and protect adults (aged 16 and over) who lack capacity to act or make some or all decisions for themselves. It places duties on Local Authorities, in Highland, these duties are undertaken by NHS as lead agency for the provision of Adult Social Work and Adult Social Care Services.

The Chief Social Work Officer retains overarching responsibility for local authority functions under the Adults with Incapacity (Scotland) Act 2000, and delegates functions and duties to social workers supporting adults with incapacity in Highland. The CSWO should be informed about an adult, subject to LAWG who may be at additional risk due to a deficit in care and support provision or is at specific risk giving cause for concern.

[Code of Practice - LAs](#)

## What is incapacity?

The Act is the first of its kind to define capacity in terms of decision-making ability and to take account of the complexity of the decisions to be made. A person is incapable, as defined by the Act, if they are incapable of;

- Acting on decisions
- Making Decisions
- Communicating decisions
- Understanding Decisions
- Retaining the memory of decisions

### Types of decision making

- **Autonomous decision making** – where the adult can make decisions freely, without influence or direction from others.
- **Supported Decision making** – aims to protect the Adult's 'legal capacity' or their right to have their will and preferences upheld. Enabling the adult to make decisions and choices with support from someone they trust.
- **Substitute decision making** – authorises someone else to make legal decisions on behalf of the adult, who lacks capacity in specific areas of decision making.

## Who decides incapacity?

Whilst social work and nursing staff are often at the forefront as to whether or not there may be an issue of incapacity, it is for medical doctors to determine if the individual does or does not have capacity in relation to the decisions requiring to be made. However, detailed assessments undertaken by the multi-disciplinary team should highlight the areas of decision making the adult requires support, in order to protect them from potential harm. [AWI Guide to Assessing Capacity](#)

The Decision Specific Screening Tool can be utilised to inform the practitioner's assessment, highlighting the areas of decision making the adult may require additional support or legal intervention. Depending on the outcome of the screening tool, it can then be used to request a formal assessment of capacity. (Appendix 1 - Decision Specific Screening tool.)

## Legislative Framework

The 2000 Act is central to the legislative tools concerned with the provision of care and protection for those considered vulnerable by mental disorder, the other Acts being:

- The Social Work (Scotland) Act 1968
- The Community Care and Health (Scotland) Act 2002
- The Mental Health (Care & Treatment) (Scotland) Act 2003
- The Adult Support and Protection (Scotland) Act 2007
- The Criminal Procedures (Scotland) Act 1995

The 2000 Act may be used separately or in conjunction with any of the above. This Practice Guidance (procedure) relates primarily to the Adults with Incapacity (Scotland) Act 2000.

It is also important to recognise when other legislation could be utilised, is less restrictive and promotes the Adult's autonomy, such as intervention under **Section 13ZA** of the Social Work (Scotland) Act 1968. [S13ZA SW\(S\) Act 1968](#) This legislation should be considered in the first instance, which allows for the provision of care and support services to an adult who lacks capacity, where there is consensus of agreement to the care plan from all parties, including the Adult, and there is no deprivation of liberty.

## 1. The Principles

### [AWI principles](#)

The Adults with Incapacity (Scotland) Act 2000 was the first Act to have at its base an overarching set of principles which **must** be followed in making decisions by all persons intervening in the affairs of an Adult, namely:

- Benefit
- Least restrictive action and minimum intervention
- Consultation with relevant others
- Take account of the adult's past and present wishes
- Encourage the adult to exercise whatever skills s/he has

N.B: These principles must also be applied where an intervention is authorised under s13ZA of the 1968 Act.

## 2. Measures of intervention authorised by the Act

### 2.1 Power of Attorney

An Adult may grant Power of Attorney giving his chosen Attorney powers over property and finance (Continuing Attorney), or welfare (Welfare Attorney), or both. An Attorney has no authority to act until the document conferring the powers has been registered with the [Office of the Public Guardian \(Scotland\)](#). (O.P.G)

The granter (the Adult) **must have capacity** to grant this and where there is doubt medical opinion **must** be sought. A Welfare Power of Attorney does not become active until the granter (the Adult) loses capacity in the areas of decision making in question, and a letter of confirmation from a doctor to that effect is generally required. The POA document normally specifies how the Adult's incapacity will be determined, e.g. by a medical practitioner, such as their G.P or Doctor overseeing their care. A copy of this letter should be kept with the Power of Attorney document and used to evidence incapacity and the Attorney's authority

to act as the Adult's proxy. It is good practice, although not a requirement, to inform the O.P.G when a Welfare Power of Attorney has been activated.

Social Work and Nursing staff should encourage adults and carers to pursue Power of Attorney where there is a diagnosis of mental disorder in which it is anticipated that capacity may be lost in the future and whilst there is still the possibility of determining the Adult's wishes regarding their future. They should be directed to the [Office of the Public Guardian \(Scotland\)](#) website for further information.

### **Revocation of Power of Attorney**

A granter may revoke a Power of Attorney in a written document which incorporates a certificate in a prescribed form by a solicitor or by another member of a prescribed class (usually doctors) stating that the Adult has been interviewed and understands the effect of such a revocation and that no undue influence has been brought to bear and the Adult has capacity. The adult should be directed to the OPG website and to seek independent legal advice.

[Code of Practice: For continuing and welfare attorneys](#)

## **2.2 Access to Funds**

Where the Adult's affairs are simple or there are savings (not derived from state benefits), then Access to Funds can be sought to access and manage the funds belonging to the adult. Access to Funds provides carers and relatives with a means of accessing the Adult's funds in order to manage day-to-day expenses and care requirements.

[Code of Practice: Access to Funds](#)

## **2.3 Management of resident funds**

Hospitals and residential care home establishments can apply to manage resident's funds, but this is rarely used in practice, with access normally sought via an application to the Department of Work and Pensions, to become appointee (e.g. relative or friend) or Corporate appointee (e.g. NHS) to manage the income which is derived from state benefits on behalf of the adult.

For corporate appointee requests, a referral should be made to Patient Funds, based within New Craigs Hospital, with evidence of the Adult's incapacity in respect of their finances.

## **2.4 Intervention Orders**

Where a one-off action would be sufficient to deal with a clearly defined financial, property or welfare matter, an application for an Intervention Order may be made to the Sheriff. If it is a standalone intervention order application this requires two medical reports and a supporting report by someone with sufficient knowledge if the intervention is regarding property or finance. This report [AWI\[10\]](#) may be completed by a social work professional or any other professional with sufficient knowledge.

If the adult is already subject to either an existing intervention order or a guardianship order no further medical reports are required for any subsequent application.

If an application for a Local Authority guardianship order and an intervention order are made simultaneously the MHO would complete the supporting report [AWI\[4\]](#).

The supporting report(s) and medical reports, where required, should then be passed to Legal Services to draft the application.

**Who can be an Intervener?** - A member of social work staff may be an Intervener but if this is proposed, a different member of social work staff is required to complete the supporting report to avoid conflict of interest. For example, the senior social worker may complete the report and nominate the allocated social worker or social work assistant practitioner to act as Intervener.

An intervener has to be a named person. If a staff member leaves the organisation or their current role, a different intervener would be required to be named. This would require a new suitability report on the replacement intervener and an application to vary an existing intervention order.

In practice, Intervention Orders are more often used in the field of property and finances as transactions tend to be one off actions, such as the signing of a tenancy agreement or investigating the Adult's financial affairs.

Welfare interventions tend to be more complex or of an ongoing nature making Guardianship more appropriate. The decision to pursue legal interventions under the Act should be discussed and agreed at the AWI case conference, ensuring the appropriate legal powers are sought to address and support the Adult's needs. However, an Intervention order may be applied for at any time if legal intervention is required. See Chapter 6: [Code of Practice - LAs](#)

[O.P.G - Intervention Order](#)

## **2.5 Welfare Guardianship**

The Local Authority has a duty to make an application for Welfare Guardianship when no one else is doing so and it is considered necessary. There may be occasions when the LA will make an application, even although a private application is likely to be made, if for example, there are concerns that the proposed applicants are not suitable or there is undue delay in the private application being progressed. (Appendix 2 – Letter templates – see T9)

Where the LA has made the application, the Guardian will be the Chief Social Work Officer (CSWO). In practice, the statutory functions and duties of guardian are undertaken by a social worker on behalf of the CSWO.

An application for Guardianship requires a summary application, accompanied by two medical reports, one by a section 22 approved medical practitioner (A.M.P) confirming incapacity (where incapacity is a result of mental disorder), the second from the Adult's G.P, and a Mental Health Officer report. The summary application and reports must be lodged in Court within 30 days of the first medical report being undertaken.

The CSWO has the power to recall a Welfare Guardianship and is under an obligation to do so if the grounds are no longer met.

The Local Authority's involvement in applications for guardianship will normally stem from a comprehensive outcome focussed assessment of the adult's needs, which highlights the risks and need for care provision to support and protect the Adult. It should also identify the areas of welfare and/ or financial decision making where the adult may require additional support and protection.

## **Change of habitual residence**

Where an adult, subject to Local Authority Welfare Guardianship moves to a different LA area, the order requires to be transferred to Chief Social Work Officer (CSWO) of receiving LA. Contact should be made with the MHO administrator who will send a letter on behalf of CSWO from Highland to the receiving CSWO in the other authority. This should be a planned transfer with an up-to-date review of the LAWG order, evidencing the powers being used in line with the principles of the Act.

## **Renewals of LAWG**

If the adult is living out-with the Highland area, the order has to be renewed in/by new LA area and Court jurisdiction.

(See: Appendix 2 – Letter Templates.)

For further information and guidance see: [Code of Practice: For anyone authorised under an Intervention or guardianship order](#)

## **2.6 Financial Guardianship**

In the case of guardianship dealing purely with property and financial matters there may be no Local Authority involvement since there is no need for a social work report to support such an application. However, it is likely that the need for financial guardianship will come to light through assessment and care management processes, for example if a person has some capital, i.e. savings, investments that they require support to manage and access on their behalf and/ or owns property. If guardianship is the only way to deal with the management of the adult's estate, and no-one else is applying, the Local Authority has a duty to make the application. The Local Authority may not act as Financial Guardian, and a suitable guardian will require to be identified. This is usually an independent solicitor.

A Financial Guardianship application requires two medical reports, as outlined above, and a report by someone with sufficient knowledge of the Adult's situation. This could be a Health and Social Care professional but normally undertaken by a social worker. There is no requirement for a Mental Health Officer to complete the required report for Financial Guardianship. Local Authority Legal Services are required to complete the Summary Application and lodge the application in Court. However, where the financial guardianship order is being sought by a private individual, e.g. a family member is seeking appointment, then the relative should instruct their own solicitor to take the financial guardianship application forward.

[O.P.G - Guardianship orders](#)

## **2.7 Limitation of Liability**

Section 83 of the AWI (S) Act makes it a criminal offence to wilfully misuse the powers of a Guardian, a Continuing or Welfare Attorney and incorporates both acts of commission and omission. Social Workers therefore must exercise judgement in this regard when supervising Guardianships and Guardians. Where there is an adult concern, adult support and protection legislation should be considered and appropriate actions initiated.

Fiduciary duty (duty of care) will not be breached if the person acted reasonably and in good faith or failed to act but the failure was reasonable and in good faith.

**NB.** Mental Health (Care & Treatment) (Scotland) Act, Section 315, makes it a criminal offence to ill-treat someone who suffers from a mental disorder.



**NB.** Adult Support & Protection (Scotland) Act, Section 49, makes it a criminal offence to prevent or obstruct any person authorised under the legislation to investigate or protect an adult at risk.

## **2.8 Medical Treatment**

### **Section 47 - Certificate of Incapacity for the provision of medical treatment**

An Adult who cannot give informed consent to medical treatment can only be treated under a Certificate of Incapacity authorised by Section 47 of the 2000 Act. This is issued by a medical practitioner, usually the G.P., or if the Adult is a hospital patient, by a hospital doctor and has a duration of up to three years. Further details and a list of medical practitioners who can issue a section 47 certificate can be found here. [MWC: S47 Good Practice Guide](#)

A section 47 certificate of incapacity is for the provision of medical treatment, this being any medical procedure or treatment designed to safeguard or promote physical or mental health that does not fall under the scope of the Mental Health (Care & Treatment) (Scotland) Act 2003 and is not an indication of the adult's welfare or financial decision-making ability.

Medical practitioners can be fairly general with the treatment plan and may delegate parts of that treatment to other practitioners who have specialist expertise such as prescribed dental treatment or physiotherapy. In the case of operations which were not foreseen a new certificate will have to be issued if the Adult is to have surgery and anaesthesia.

If a Welfare Attorney or Guardian have been granted powers in relation to medical care and treatment they must be consulted and consent to the medical treatment proposed. The legal powers held should always be checked, recorded and a copy of the order held in the patient's medical record and client social work electronic file.

Welfare Attorneys and Guardians must be consulted by medical practitioners in the formulation of treatment plans. Welfare Attorneys and Guardians may have been granted powers to access medical information and data concerning the Adult and to consent to or decline some forms of treatment for example, more aggressive forms of treatment.

#### **Disagreement with proposed treatment-**

Where the medical practitioner has consulted the welfare attorney or welfare guardian and there is disagreement to the proposed medical treatment, the medical practitioner should contact the Mental Welfare Commission for an independent medical opinion as to the proposed medical treatment.

If the MWC appointed medical practitioner agrees with the proposed treatment, then it can be given. However, if the medical practitioner disagrees with the proposed treatment, the medical practitioner responsible for the patient can apply to the Court of Session for a determination as to whether the proposed treatment should or should not be given.

An interdict prevents any medical treatment from being given.

## **3 Public organisations**

### **3.1 The Office of the Public Guardian**

All Guardianship orders and Powers of Attorney must be registered with the [Office of the Public Guardian \(Scotland\)](#) (O.P.G.). A Power of Attorney does not become effective until it is

registered with the Office of the Public Guardian. They will provide help and guidance to all prospective applicants by telephone or via the website.

The OPG has a specific remit to oversee the operation of Guardianships with powers over property and financial affairs and has a duty to investigate complaints into the misuse of powers in relation to these. The Public Guardian's powers to make enquiries into misuse of financial powers have been extended by the Adult Support & Protection (Scotland) Act 2007.

### **3.2 The Mental Welfare Commission**

[The Mental Welfare Commission](#) has a duty to oversee the operation of Welfare Guardianship orders and to investigate any complaints relating to these, or deficiencies in the care provided to the Adult.

They have a duty to visit those under Guardianship Orders and will require to be updated by those Social Workers who have responsibility for supervision of the Adult and the Guardian as to how those powers are being used. The MWC must be notified if the requirement for supervision has been varied or ceased. See Appendix – 'Form of Notice to the MWC' in link below.

[MWC- Supervising welfare guardians and Powers of Attorney](#)

They will also require to be notified by Social Workers if Guardianships have been revoked, if the Adult has moved to another Local Authority area, and if there are any issues regarding the Guardian exercising their powers unsatisfactorily or inappropriately.

## **4. Highland Mental Health Officer Service**

**4.1** Mental Health Officers are tasked with carrying out the duties of the Local Authority in terms of the Adults with Incapacity (Scotland) Act 2000, the Mental Health (Care & Treatment) (Scotland) Act 2003, Adult Support & Protection (Scotland) Act 2007 and the Criminal Procedures (Scotland) Act 1995. Their role is to advise on appropriateness of the use of the 2000, 2003, 2007, 1995 Acts.

The Highland MHO service, provides advice, guidance and responds to statutory requests under AWI, MH, ASP, CP Act legislation, including attending AWI case conference meetings and advising on any proposed interventions under the AWI Act.

[Highland MHO Service leaflet](#)

If it is considered that action may involve the use of legislation under the Adults with Incapacity (Scotland) Act 2000 and there is no private individual willing or able to make an application, NHS or Highland Council social work professionals should make a referral to the Highland MHO Service. If there are concerns about any private application, these should be discussed with MHO Service and HC Legal services.

Referral to the MHO Service should be made by completing the Highland AWI referral form (Appendix 3 - Highland AWI Referral Form) at least 2 weeks prior to any proposed AWI CC meeting.

The designated Mental Health Officer will liaise with the social work professional, Council Solicitor and any other relevant individual, and then an Adults with Incapacity Case Conference will be convened. (Appendix 4 – S.O.P AWI Case Conference.)

Email address: [HSCMHO.Managers@highland.gov.uk](mailto:HSCMHO.Managers@highland.gov.uk)

If the outcome of the case conference is to proceed with a Local Authority application for guardianship the allocated social work professional must send the AWI CC minute and MHO referral form to the MHO service to progress the application.

All referrals are screened jointly by NHS and the MHO service to prioritise requests for S22 medical assessments. An MHO is allocated once the date of the S22 AMP assessment is known.

## **4.2 Central Database**

The Adults with Incapacity Central Database is currently maintained by an MHO administrative assistant who is responsible for entering all data concerning persons subject to Orders onto the CareFirst system.

All requests for Intervention Orders, Guardianship Orders and any other legal interventions under Adults with Incapacity (Scotland) Act 2000 must be notified here regardless of whether the application is made by the Local Authority or not. By doing so, responsible social work officers can be updated as to revocations, recall and notified of forthcoming renewals.

# **5. Adults in the Community**

## **5.1 Capacity & Incapacity - Identifying decision making ability**

[AWI- Guide to assessing capacity](#)

In the course of assessing an individual's needs, social work practitioners may become aware that an Adult may be incapable of making informed decisions in major areas of their lives. This opinion will be based on discussions with the Adult (insofar as they are able to participate) consultation with family/carers, relevant professionals and medical personnel, and consultation with line managers.

Capacity is not all or nothing. There will be areas of decision making that the adult can still make (autonomous decision making), areas where they will require support to make a decision (supported decision making) and areas where they will require someone else to make decisions for them, (substitute decision making) in the form of a legal proxy.

The **Decision Specific Screening Tool** is primarily designed for non-medical members of professional teams and provides a structured way for professionals to consider whether an adult requires a formal assessment of their capacity for decision making. It is designed to support professionals to consider key factors relating to an adult's capacity at an early point and record that information. Then, where an assessment of capacity is required, used to refer the Adult for further assessment. (Appendix 1 – Decision Specific Screening Tool)

## **5.2 Pre-existing powers**

The social work practitioner should establish at an early stage whether there is an appointed legal proxy in relation to welfare and/ or financial/ property matters, and what are relevant to the Adult's current situation.

The Office of the Public Guardian (Scotland) are responsible for holding and maintaining a public register of all Powers of Attorneys, Guardians and anyone appointed under an Intervention Order. In Highland, the Administrative Assistant for the MHO Service is the authorised link person with OPG. Email: [HSCMHO.Managers@highland.gov.uk](mailto:HSCMHO.Managers@highland.gov.uk) to request a check to be undertaken with the O.P.G.

### **5.3 Discussing Private Guardianship**

Social work practitioners should establish whether or not a private individual is in the process of making an application for Guardianship. The social work practitioner may give advice concerning the process of Private Guardianship but should refrain from advising this course of action unless there is a definite medical opinion as to incapacity and other legislative options have been ruled out by consultation with relevant other professionals. Consultation should include the Mental Health Officer Service and on certain occasions, with Legal Services. This is to ensure the MHO service is aware of a potential application being progressed. Consultation with legal services may be required where a LA application may need to be made, e.g. if there are significant delays in the private guardianship being progressed and/ or is an urgency in seeking legal authority. (Appendix 4 – S.O.P AWI Private Welfare Guardianship.)

### **5.4 GP involvement**

Social work practitioners should establish a preliminary opinion of the Adult's capacity to make decisions in the areas of concern. The Decision Specific Screening Tool (Appendix 1) can be utilised and shared with the Adult's G.P, which will assist in focusing their assessment on the areas of decision making that require to be assessed. This will facilitate discussion regarding possible legal interventions required to support decision making. The GP should provide a medical opinion in relation to the areas of decision making that have been highlighted as areas of concern and/ or need and be invited to attend any planned AWI Case Conference.

## **6. Adults admitted to hospital & use of S13ZA**

- 6.1** If, following a crisis in the community, the Adult is admitted to hospital, social work staff must notify the hospital and Dr responsible for the patient, of the current situation with regards to any care planning under consideration in respect of Adults with Incapacity (Scotland) Act 2000. This should include the views of the Adult themselves, carers/family and any other interested parties. If there is a legal proxy with welfare powers, this information **must** be shared with the medical team and recorded. A copy of the powers held by the proxy **must** be saved in the adult's medical record.

Where an Adult is admitted to hospital, ward staff should contact the relevant area social work team, to appraise them of the situation and determine if the Adult has had any involvement from social work. If not, then an early referral for a social work assessment should be undertaken. If the Adult's capacity requires assessment; medical opinion should be sought to confirm the areas of decision making in which the adult requires support.

Appendix 4 – S.O.P - AWI Admission to Hospital & Legal Authority.)

### **6.2 Section 13ZA – Social Work (Scotland) Act 1968**

Following the principle of least restrictive intervention, Section 13ZA should be discussed and considered where an adult lacks the capacity to consent to care planning.  
Appendix 5 - S13ZA Procedures.

Appendix 4: S.O.P S13ZA. The Adult's views should be sought, recorded and evidence a consistent opinion as to the proposed planned action. A referral to Independent Advocacy should be considered to ensure the Adult's views are fully represented.

A decision to utilise S13ZA for the provision of care and support, and where this relates to the provision of a care home placement, this must be discussed and agreed at the point a vacancy has been identified within a suitable placement, and the planned move is supported promptly.

If Section 13ZA is applicable following a case conference/ MDT meeting (all relevant people must be invited and/or consulted), the allocated social work practitioner should complete the Appendix 6 - S13ZA checklist, which should be authorised by the social work team manager or senior social worker. This should be clearly recorded in the adult's CareFirst electronic record and saved in their social work file, prior to any planned move.

[CoP LA - Annexe 1: CCD5/2007 Guidance re use of S13ZA.](#)

[MWC - Cheshire West and S13ZA](#)

[SG Guidance Choosing a Care Home - see s26 re: S13ZA](#)

## **7. Young People and the Act**

Section 79(A) Adults with Incapacity (Scotland) Act 2000 allows for Guardianship Applications to be made for children, 3 months before they reach their 16<sup>th</sup> birthday. A Guardianship Order may be made in this time but will not become effective until the child becomes an Adult at the age of 16. This section was added in recognition of the delay in decision making Orders, in which vital decisions were not authorised until many weeks after the Adult's 16<sup>th</sup> birthday.

## **8. The Chief Social Work Officer as Guardian – LAWG application**

### **8.1 Case Conference**

If a family member or other interested party do not intend to pursue an application for a private guardianship order, and intervention under the legislation may be required, then an AWI Case Conference must be convened by social work services. Appendix 4- SOP: AWI – Case Conference.

The social work practitioner should submit a referral to the MHO service, Appendix 3, providing background information and detailing areas of risk that highlight the need for legal intervention to support decision making. This referral initiates a request of attendance by a H.C legal representative and an MHO at an AWI case conference. The practitioner should initiate the referral at least 2 weeks prior to the proposed date of the meeting.

### **8.2 Planning an AWI case conference**

**The following staff should be invited to the AWI case conference:**

- Social worker or social work assistant practitioner,
- Social Work Team Manager or Senior Social Worker (Chair)
- Mental Health Officer
- Solicitor from Highland Council Legal Services
- Medical/Nursing representatives – Consultant, G.P., Nurse, CPN, etc
- Nearest relatives
- Primary carers
- Independent Advocacy

- Any other relatives/professionals with an interest, e.g. private solicitor and any other relevant Adult Social Care staff

NB: The Quorum for a decision-making AWI case conference must include representatives of Highland Council Legal Services and the Mental Health Officer Service, to agree any substantive legal measures in respect of the Adult.

The Adult should be invited to the AWI case conference unless it would cause undue stress or significant risk. If the Adult is unable to participate in the meeting, or does not wish to attend the meeting, their wishes and feelings about an Order should be ascertained prior to the meeting and a referral made to independent Advocacy, if appropriate.

### **8.3 Case Conference Report**

Prior to the AWI Case Conference, the responsible social work practitioner must compile a brief background report to inform the Case Conference. (See Appendix 7 - for AWI CC documents, see AWI CC Report template.)

This report should be circulated to everyone invited to the meeting prior to the AWI CC, ensuring the content has been discussed with the adult, and their views and wishes sought. A referral to independent advocacy should be made prior to the AWI CC to enable the Adult's views to be represented.

### **8.4 Chair**

The role of Chair of an AWI Case Conference is undertaken by the social work team manager or senior social worker of the area in which the Adult normally resides or was resident in immediately prior to hospital admission.

Appendix 7 - Aide Memoire for Chair  
Appendix 7 - AWI CC Agenda template

If it is decided not to call an AWI Case Conference, then the reasons must be recorded on CareFirst, stating clearly any alternative considered and agreed.

### **8.5 Minutes**

Minutes of the AWI Case Conference must be taken. It is the responsibility of the Chair to organise this. Appendix 7 – AWI CC Minute.

The minute taker should record who is present and their contact details, and their involvement with the Adult. Details of dialogue and interactions between the parties particularly any issues and objections should also be recorded in the minute.

**The Chair should summarise the following for the minute taker at the end of the meeting:**

- Confirmation that the Adult lacks decision making ability in respect of the proposed interventions
- Whether the application will proceed or whether an alternative course of action has been agreed
- Who will be the proposed Guardian, and if this is the Chief Social Work Officer, who will be the Responsible Officer for supervisory purposes and/or a proposed Intervention Order
- What powers are seen to be necessary in terms of the proposed care plan
- Is an Interim Order required (see Interim Orders Section 57(5) of the Act), if so, then are services available or a placement identified at the time of lodging the application?

- Whether the Order is likely to be opposed by any of the parties with an interest
- Financial/ property issues - considered and discussed. This must be recorded in the minutes, detailing how finances are to be managed e.g. by a relative as financial guardian or nomination of a Solicitor as financial guardian or management of funds by other means.

Copies of the minutes should be sent to those attending the AWI Case Conference within 10 working days. This is the responsibility of the Chair and is required to inform Legal Services for their drafting of the Summary Application, and to inform the Mental Health Officer's report. To progress a LAWG application, the AWI case conference minutes and the updated MHO referral form must be sent to the MHO service, which will initiate the triage process to identify a S22 Dr to undertake the first medical assessment and AWI[1] report.

**N.B:** It is the responsibility of the allocated social work practitioner to ensure contact details for all interested parties/ relevant people, including family members and professionals (including G.P contact details) are documented and provided to the MHO and Legal representative.

The decision of the AWI case conference must be communicated to the Adult. This should be by the social work practitioner allocated to the case.

**NB:** If following the case conference, the family state their intention is to pursue a private application to become Guardians, they are required to confirm the details of their solicitor in writing to the Chair of the AWI Case Conference within 2 weeks of the meeting. The case holder is required to follow this up to avoid any unnecessary delay. See Appendix 4 – SOP Private Guardianship

## 8.6 The application process for LA Guardianship

Applications for Guardianship are completed by the Local Authority in which the Adult is habitually resident. [Habitual and Ordinary residence guidance 2015](#) This includes renewal applications, which must be undertaken by the LA where the adult currently resides.

An application for Guardianship consists of the following: Summary application, 2 medical reports and a report by a Mental Health Officer.

The application is made and presented to Court by Legal Services and must be accompanied by two medical reports, one of which must be by a Section 22 Approved Medical Practitioner i.e. Consultant or Specialist Psychiatrist where there is mental disorder. The second medical report is usually completed by the GP but can be completed by another doctor if the Adult is in hospital. Legal Services must lodge the Summary Application and reports in Court within 30 days of the first medical report.

**N.B:** The definition of relevant medical practitioner, in updating AWIA 2000 being annotated to insert (ASP 2007) the MHC&TA 2003 definition of section 22 approved medical practitioners.

Section 22 of the MH(C&T)(S)A 2003 referred to, sits within Part 4 of the Act – Health Board and Local Authority Functions; Chapter 1 – Health Board Duties and Approved Medical practitioners. This together with section 57 3(a) of the AWIA 2000 clearly puts an obligation and duty on the Health and Social Care Partnership to provide the section 22 Drs reports to accompany guardianship applications, as without them we cannot have implemented legislation and cannot provide support and protection for those persons who need this level of provision.

The MHO will request the 2nd medical report from the Adult's G.P and inform them of the timeframe for completion of the report, i.e must be within **21 days** of the date of the first medical report. This request should seek the G.P's view on the Adult's ability to make decisions with regard to the powers sought, which should be detailed in the requesting letter/ email.

Where incapacity is due to physical inability to communicate the social work practitioner should complete the Chief Social Work Officer's report [AWI \[5\]](#).

Where the application concerns only property or finance the social work practitioner or any other suitable officer may be able to undertake the report for the Intervention order. [AWI \[10\]](#)

**NB:** Social work practitioners may make applications and can act as Interveners but may not act as Financial Guardians and a suitable independent solicitor has to be found to act in this regard. Such issues should be raised and discussed at the AWI Case Conference in order that there is clarity of role and responsibilities in respect of the making of such applications.

If a **financial guardian only** is required, the application can be made by the firm of the private solicitor to be appointed. The application does not require to be made by Legal Services.

## **8.7 Content of Reports**

Reports are completed on the statutory forms. [AWI forms](#)

The Mental Health Officer (or social work report for an application that contains only an Intervention Order) report must contain the following:

- The Author's opinion as to the general appropriateness of the Order sought with comments on each power requested.
- Whether any conflicts of interest have been identified.
- Evidence that the Author has applied the general principles of the Act to the application.
- Consideration of whether there were less restrictive alternatives that could have achieved the benefit sought, and
- Justification of the rejection of *the* less restrictive alternative courses of action.
- The views of the nearest Relative, Primary Carer and all parties with an interest in the affairs of the Adult.
- The views of any Guardian or Attorney appointed under the Act.
- If the Adult is also subject to compulsion under the Mental Health (Care & Treatment) (Scotland) Act 2003, and has nominated a Named Person, the views of the Named Person as defined by that Act must be included.

In a Local Authority application appointing the Chief Social Work Officer, the part of the report concerning suitability of the proposed Guardian is left blank.

## **8.8 Lodging the Application**

The reports are sent to Legal Services by email (electronic signature is acceptable), and a copy of the application is retained by the MHO service and saved in the Adult's electronic social work file.

**It is essential for legal services to receive full contact details of all interested parties on whom papers will have to be served.**



On receipt of the three reports, legal services will draft the summary application and lodge the application and reports with the Court.

A Warrant of Intimation, listing interested parties will be issued by the Court with a date for a hearing. The application, including all reports, is then intimated to all interested parties listed in the Warrant by Legal Services in advance of the court hearing. 21 days' notice of the hearing date requires to be given.

## **8.9 The Court Process**

If the application is for Guardianship and an Interim Order is sought, the hearing will usually take place within a few days of the application being lodged. (An interim order is requested at the point of lodging the application, if an urgent need for legal powers is required, usually to move an adult into LTC from hospital.)

The Adults with Incapacity (Scotland) Act 2000, as amended by the Adult Support & Protection (Scotland) Act 2007, obliges the Sheriff to take the wishes and feelings of the Adult into consideration in his determination, and those wishes and feelings as represented by Independent Advocacy.

## **8.10 Interim Orders - urgent authority required**

An Interim Order is requested in cases where there is urgency to enable the Adult to be protected until a full Hearing can take place.

The same reports are used for both Interim and full Hearings, 2 medical reports and an MHO report to accompany the application, as per normal procedure. In urgent situations, the AWI case conference may be convened using digital technology, ensuring all parties are consulted. Social work practitioners must keep MHO colleagues informed of any changes in the adult's circumstances during the application process.

Where concerns are reported under Adult Support & Protection (Scotland) Act 2007 this may result in consideration of the use of Mental Health (Care & Treatment) (Scotland) Act 2003 legislation until measures under Adults with Incapacity (Scotland) Act 2000 can be sought.

***Legal Services and the Mental Health Officer Service should be consulted as a matter of priority when such situations arise to avoid unnecessary delay in responding to matters of concern in respect of an Adult at risk who lacks capacity.***

An Interim Guardian is a Guardian for the purposes of all relevant provisions of the Act and may exercise the powers granted by this accordingly. The powers are usually limited to what is absolutely necessary to protect the Adult.

There is no requirement to notify the Adult or other interested parties of a Hearing for an Interim Order. For the full Hearing any person with an interest in the Adult must be notified unless there is good reason for not doing so. This would normally include parents, siblings or children of the Adult and collection of such information as far as it can be ascertained when the reports are sent to Legal Services will save much delay in the Court process.

## **8.11 Notification of delegated Guardian's contact details**

If the interim / LAWG order is granted, then notification letters must be sent to the adult (Appendix 2 – Letter Templates, T1/T3) (unless the Sheriff has directed the adult should not be notified), and the MWC (T2/T4) of the order, within 7 working days of the order being

granted, with contact details of the delegated Guardian. Where it is not possible to allocate the duties to a social worker, this role must be held by the social work team manager.

### **8.12 Interaction with Adult Support & Protection Legislation**

The decision to pursue an Interim Guardianship Order may arise from an Adult Support & Protection Case Conference in which case the relevant professionals and interested parties may have already convened at this overarching event. In this case a further case conference need not take place, although a core group meeting may be beneficial to discuss the legal powers required. This meeting would require the allocated social work practitioner, social work team manager or senior social worker, MHO and representative from legal services.

In cases of extreme urgency where there is substantial risk to the Adult's safety, but which does encompass issues of neglect or ill treatment, an application may be made without an actual meeting taking place provided that all relevant parties' views are represented, and the Team Manager and social worker/ council officer and Legal Services are in agreement to proceed.

It must be borne in mind that the use of Adults with Incapacity (Scotland) Act 2000 is not a quick process and is dependent on the legal process in accordance with prescribed timescales.

### **8.13 Attendance at Hearings**

The Sheriff Clerk will arrange the date of the full Hearing usually within 28 days of an application being lodged but it will depend on Court availability.

The notice of intimation is worded so that the recipient may attend the Hearing if they wish to, but in general they need only do so if they were opposing or are not in agreement with a particular issue and wish to be heard. No attendance by another party is required at the hearing, but interested parties have the right to be heard if they wish.

Both the Adult and any interested party have the right to oppose the application and may engage legal representatives to do so, or they may attend the Hearing and speak directly to the Sheriff. The majority of Hearings are now held remotely via Webex rather than in person.

If, for any reason intimation fails, a further Hearing will require to be arranged before the application can be dealt with by the Sheriff.

Legal Services will represent the Local Authority in applications. If there is no opposition and the Sheriff is satisfied with the reports and the application, the application will usually be granted.

If the Sheriff is not satisfied, he/she will arrange a Hearing for evidence to be led or will determine further procedure.

### **8.14 Safeguarders and Curators**

The Sheriff may appoint either Curator ad litem or Safeguarder, both of whom are independent solicitors, even if the application is not opposed. The Mental Health Officer will generally comment in their report as to whether the Court might consider appointing a Safeguarder but the decision is for the Sheriff. (Consideration of appointing a safeguarder should be discussed at the AWI case conference.)

A Safeguarder's job is to convey the Adult's views to the Court in cases where the Adult does not have capacity to instruct a legal representative.

The Curator's role is to act on the Adult's behalf where the Adult does not have capacity to instruct a legal representative. A curator is likely to be appointed if the Sheriff thinks it is not possible to combine the functions of conveying views and safeguarding the interests of the Adult, and more representation on the Adult's behalf is needed. A Curator may oppose the granting of the application on behalf of the Adult and looks at the Adult's welfare in a more holistic way, beyond the existing legal action.

### **8.15 Approval and Notification**

Where the Sheriff grants an Interim or LAWG Order the social work practitioner is informed in writing by Legal Services (email suffices) of the powers granted, and the Guardian or Intervener may then start to exercise their powers. Where an Intervention Order has been granted, the Intervener may find it difficult to exercise their Powers until a Certificate of appointment has been issued by the OPG, particularly if seeking to investigate and manage the adult's financial affairs.

The Sheriff Clerk notifies the Public Guardian who registers the application. The Public Guardian issues a certificate of Appointment to the Chief Social Work Officer of the Local Authority either directly or c/o the Highland MHO service. On receipt of this, the Chief Social Work Officer (C.S.W.O) must immediately forward the Order to the Principal Mental Health Officer at HMHO service.

The MHO Service administrative assistant will enter the Order on the social work recording system and will send a copy of the Order to the relevant social work team/ practitioner.

A social worker **must** be allocated to the adult subject to LA Guardianship at **all** times, and assumes the role of welfare guardian on behalf of the C.S.W.O.

## **9. Private Guardianship Applications**

### **9.1 Referral for Mental Health Officer Report**

Where a private individual is making an application pursuant to Adults with Incapacity (Scotland) Act 2000 their solicitor will inform the Chief Social Work Officer, in writing, of the intention to make a private application. The C.S.W.O must respond to this request within 7 days.

All notifications of pending applications which are received by the C.S.W.O must be forwarded immediately to the Principal Mental Health Officer for allocation of a Mental Health Officer.

Private applications for guardianship require the same reports and need to meet the same timeframes as for LA Guardianship applications.

### **9.2 Time Frame for Mental Health Officer Report**

The Mental Health Officer must submit their report to the solicitor within 21 days of receipt of the notification to the Chief Social Work Officer. Any information asked of social work is essential and requests for such information should be considered a priority.

### **9.3 Medical Reports**

Solicitors arrange for two medical reports to be completed, one by a S22 Approved Medical Practitioner, and second by the adult's GP. The application must be lodged in Court within 30 days of the completion of the first medical report.

### **9.4 The Powers sought in private application**

In order that the Mental Health Officer and medical practitioners can comment on the appropriateness of the powers requested, a copy of the Summary Application should be included by the solicitor, along with their notification to the C.S.W.O. If not included, Mental Health Officer should request this from the solicitor, as a priority.

### **9.5 Content of reports**

Reports are completed on the statutory forms. [AWI forms](#)

The Mental Health Officer's report to accompany a private application for welfare guardianship requires the same information as in a LA application (see 7.7) with the addition of the following:

- Consider and comment on the suitability of the proposed Guardian(s) to exercise the powers applied for and interview the proposed Guardian(s) to determine their understanding and advise of their duties and responsibilities. Thereafter, detailing the information within their report.
- Refer to all accompanying information and medical reports, in particular diagnosis of mental disorder, the nature of the disorder and how it affects the Adult and their decision-making ability.

### **9.6 Submission of private application**

A letter should accompany the MHO report being sent to the solicitor, requesting that the Mental Health Officer and social work practitioner (as appropriate) be informed of the date and outcome of the Court Hearing by email. This will allow the social work practitioner to take up their duties in respect of care measures and supervision.

## **10. MHO's Suitability Report – Private Applications**

### **10.1 Excessive Powers and Unsuitable Guardians**

During the course of their interview with the proposed Guardian(s) and following consultation with relatives and professionals, the Mental Health Officer may be of the opinion that the proposed Guardian is not suitable, because of an inability to fulfil the role and function of a guardian, or the powers craved are not in accordance with the adult's needs are disproportionately restrictive.

### **10.2 Informing the Applicant**

Although the proposed Guardian has commissioned the report through their solicitor the opinions expressed by the Mental Health Officer within that report may be unfavourable.

If this is the case the Mental Health Officer must inform the prospective Guardian and their solicitor in writing and give reasons for this opinion. The Mental Health Officer should also inform the Principal Mental Health Officer and Legal Services.

### **10.3 Accountability of Mental Health Officers**

Mental Health Officers are in a semi-autonomous position and are accountable to the Law and to the Courts in terms of the content of their reports, and not to the applicant. In the event of a dispute over a proposed Guardian's suitability, guidance should immediately be sought from Legal Services and the Mental Welfare Commission.

### **10.4 Action following a negative Suitability Report**

If a Guardianship Order is still deemed to be necessary and the proposed Guardian is unsuitable, discussions should be held with Legal Services and the Principal Mental Health Officer to consider an application naming the C.S.W.O as proposed Guardian if no other person is suitable and able to make the application. It is the social worker's responsibility to instruct legal services to make an application on behalf of the CSWO.

## **11. Private Guardians**

### **11.1 Joint and Substitute Guardians**

Private individuals may function as sole Guardians but if they are unavailable for short periods, e.g. holidays, they may delegate their powers to others. Most of the powers involving the daily care of the Adult will ordinarily be delegated to carers or care homes, which should be clearly documented.

If Guardians are jointly proposed, or if there is to be a substitute, the Mental Health Officer report must include details of both parties' suitability.

Factors which the Sheriff must take into account before appointing a Guardian are set out in Section 59 of the Adults with Incapacity (Scotland) Act 2000.

### **11.2 Resignation of Private Guardian**

If a Guardian resigns there must be continuity of the Guardianship or a judicial determination that this is no longer required.

Unless a joint or substitute Guardian is named on the Order the Guardian must apply to the Sheriff for his own removal and replacement (Section 71(a)), or a judicial determination to end the Guardianship (Section 71(c)).

In the case of a joint (or substitute) Guardian who is willing and able to act, the Guardian must give notice in writing to the Mental Welfare Commission and the Office of the Public Guardian.

### **11.3 Death of a Private Guardian**

Section 75(A) has been added to the Adults with Incapacity (Scotland) Act 2000. Upon death the representatives of a Guardian shall notify the Adult, the Office of the Public Guardian, the Local Authority and the Mental Welfare Commission in cases of mental disorder and personal welfare.

The death will be registered by the Office of the Public Guardian and a new certificate of appointment issued to any surviving joint Guardian, or to any substitute Guardian who is willing to act and who can give the necessary security.

## **12. Recording of Guardianships and Intervention Orders**

When an Order is granted, the Court will inform the Office of the Public Guardian who then notifies the Chief Social Work Officer. This should be sent by email to [HSCMHO.managers@highland.gov.uk](mailto:HSCMHO.managers@highland.gov.uk) where the MHO administrator will save the details of the order, share the information with the relevant social worker/ team, and enter the information on the social work database.

It is the responsibility of the delegated guardian to ensure that an AWI review of the order is undertaken minimum of 6 months prior to the renewal date, and to then inform the MHO service of further instruction.

Private guardianship orders require to be reviewed, with support provided to the Guardian to ensure the powers support the adult's needs, and they instruct their solicitor at least 3 months prior to the expiry of the order if renewal is required.

The MHO Administrator will email renewal dates to the relevant social workers 3 months prior to the renewal date, if they have not received instruction.

## **13. Guardianship - Statutory social work duties**

### **13.1 Delegation of duties**

Under Integration of Health & Social Care, the Chief Social Work Officer has delegated functions under Section 10, AWI 2000 and from the 1<sup>st</sup> of April 2012, social workers, employed by NHS Highland, are responsible for the review of guardianship orders, support and supervision of Private Guardians in Highland. (N.B: The role of case holder may be held by another social work practitioner in the team, or by the supervising social worker.)

Children's Services Social workers employed by Highland Council, supporting young people aged 16 – 18 years old in education, and those who have left education but remain on a legal order, are responsible for the review of guardianship orders, and support and supervision of Private Guardians in Highland. (Appendix 4)

### **13.2 CSWO as Guardian**

When the Chief Social Work Officer is appointed as Welfare Guardian, the functions and duties of Guardian are delegated to a Highland Council or NHS Highland social worker. The social worker will be the supervising officer of the Adult.

Any LAWG order for which there is no designated Social Worker, must have a social worker assigned immediately on receipt of the notification, by the responsible social work team manager and if unable to allocate, the Team Manager will be Supervising Officer by default.

### **13.3 Statutory Contact**

The Adult and the Guardian(s) (where this is not the CSWO) must be seen within 3 months of the Guardianship order being granted. It is a statutory requirement to hold an AWI review of the guardianship order, supervise and support any private guardian(s) within this period, and undertake a further AWI review within 12 months. The frequency of supervisory reviews can be ceased or varied following the 12-month review, in respect of private orders.

Appendix 2 - T8 template should be sent to the private Guardian(s) following notification to the LA of their appointment, informing them of the statutory obligation placed on LAs to supervise the order and the actions of the Guardian.

The Adult should continue to be seen regularly, and the supervising officer should ensure their contact details are shared with the adult, the Guardian(s), any care provider and the MWC.

### **13.4 AWI Reviews and Supervisory Duties**

When undertaking a review of the Welfare Guardianship Order, the Social Worker should concentrate on the Order and the welfare powers included, ensuring any actions taken evidence adherence to the principles underpinning the AWI 2000 Act.

The Social Worker should complete the 'AWI Guardianship Review/ Supervision Form' on CareFirst. This form must be completed for private and Local Authority Welfare Guardianship orders.

Once complete, the Social Worker should send a copy to the Private Guardian(s). The MWC should receive a copy where there is a need to highlight an issue, e.g. concerns about the Guardians ability to perform the role, concerns about the Adult etc. Completed supervisory forms will create an activity for the next review, which will prompt practitioners and inform reviews of orders prior to consideration of any renewal application. This will provide a chronology of information that will inform any future renewal application, recall or decision to change/vary/cease the supervisory visits. [MWC - Supervising Welfare Guardians, and Powers of Attorney](#)

The frequency of supervision was varied by the amendment to the regulations in 2014. <http://www.legislation.gov.uk/ssi/2014/123/made>

See Appendix 4 - S.O.P – AWI Guardianship & Supervision, step 5 details the process to follow when considering ceasing or varying the supervision requirement.

### **13.5 Variation of powers**

Where there is a need to vary the powers of an order, contact should be made with HC legal services and the MHO service to discuss the proposed variation, and any information required to support the application.

A variation to the powers granted may be required if there has been a significant change in the adult's decision-making ability or more specific legal authority is required to manage risk.

A variation can be sought via an application to the Sheriff, which is submitted by legal services with an accompanying report from an MHO or social worker, detailing what is required and why.

### **13.6 Recording Decisions**

Guardians have a duty to record decisions made in the exercise of their powers.

## **14. Replace or Remove Guardian, and Recall of Guardianship**

### **14.1** An application can be made to the sheriff by an adult subject to guardianship, or by any other individual claiming an interest in the adult's welfare, financial or property interests, to replace or remove a guardian, or recall the guardianship order.

A Guardian may be replaced if the proposed individual is deemed suitable by the sheriff to act as guardian or that a joint guardian is able to continue in the role of guardian.

A guardianship order may be recalled if the grounds for appointment of a Guardian are no longer met (e.g. the Adult regains capacity or the interests of the Adult in property, financial affairs or personal welfare can be satisfactorily safeguarded or promoted in some other way.

- 14.2** Either the Adult or any other person with an interest may make an application for the recall to the Sheriff. The Local Authority would be considered as a person with an interest in relation to such cases. Applications for recall by the Local Authority will be made by Legal Services following consultation with the Guardian, allocated Social Work practitioner and a Mental Health Officer. This is done by lodging a formal Minute with the Court where the Adult is habitually resident.

#### **14.3 Recall by Local Authority**

If the Chief Social Work Officer is the Guardian, the Local Authority may recall the powers of a Welfare Guardian without going to Court, if Guardianship is no longer needed.

The Local Authority can either do this at its own instance or on an application by the Adult or any person with an interest. In such cases, the Adult, nearest relative, primary carer and any other person with an interest must be given time to object (21 days) before the powers can be recalled.

If a Guardianship or the powers of a Welfare Guardian are recalled, the Local Authority must notify the Public Guardian and the Mental Welfare Commission by completing statutory form [AWI \[19\]](#) and record the reasons for doing so. If any of the interested parties object to the recall the matter must be referred to the Sheriff.

#### **14.4 Appeal Against Recall**

The Chief Social Work Officer may decide to recall a Welfare Guardian's powers or to refer the matter to the Sheriff for a decision by completion of a statutory form. Whatever the decision, the Guardian has the right of appeal to the Sheriff whose decision on the matter is final.

#### **14.5 Recall by Mental Welfare Commission**

The Mental Welfare Commission may recall a Guardian's welfare powers having formed this opinion through their own supervisory work and contact with the Adult and Guardian.

#### **14.6 Recall of Financial Powers**

The Public Guardian may recall a Guardian's financial powers if there is evidence of misuse. Cases where there is such concern should be referred in writing to the Office of the Public Guardian. Concerns about misuse of financial powers **must** be brought to the attention of the responsible Team Manager and Adult Support & Protection procedures followed.

#### **14.7 Necessity of Powers**

In the course of their supervisory powers social work practitioners may reach a conclusion that the welfare powers of the guardian are no longer necessary in which case the procedures for recall should be followed.

#### **14.8 Misuse of Powers**

Occasionally a Welfare Guardian may neglect their duties, be inaccessible or obstructive to the Adult's care provision. Other interested parties may object to the way in which the Guardian is using their powers. The social work practitioner may form an opinion that the



powers of the Welfare Guardian are not being used in a satisfactory way, i.e. the best interests of the Adult are not being served, in which case they should refer to Legal Services.

Concerns about misuse of welfare powers **must** be brought to the attention of the responsible Team Manager and Adult Support & Protection procedures followed. A chronology of significant events should be compiled, evidencing the accumulation of concerns regarding actions and decisions of the proxy decision maker.

The Council's Legal Service should always be consulted where recall, removal or replacement is being considered.

## **14.9 Parties with an Interest**

In cases where the Chief Social Work Officer is appointed Guardian the Local Authority may wish to recall the Guardianship if the grounds for Guardianship are no longer fulfilled, **or** the interests of the Adult can be safeguarded by some other means (AWI 2000 Section 73(a)). The Adult themselves can also make an application under this section for recall of Guardianship. In such cases the Local Authority must treat the Office of the Public Guardian and the Mental Welfare Commission as if they were interested parties. If there are objections the recall cannot proceed and must be heard by the Sheriff.

The Public Guardian must notify the Local Authority and the Mental Welfare Commission in writing if they have recalled the financial powers.

All changes to Welfare and Financial Guardianship will be registered with the Office of the Public Guardian.

Copies of recall forms received must be sent to Mental Health Officer Service administrative assistant where they will be copied/scanned and sent out to the relevant social work practitioner, Guardian(s) and relevant parties.

## **15. Supervision of Attorneys**

### **15.1 Supervision of Attorneys**

A Welfare or Continuing Attorney may not do anything which is at the expense of the Adult's financial or welfare needs.

An application can be made to the Sheriff, by anyone claiming an interest in the property, financial affairs or personal welfare of the granter of a continuing or welfare power of attorney.

**Direction of Sheriff** - The Sheriff can make an order ordaining the continuing attorney to be supervised by the O.P.G, to submit accounts to be audited by the O.P.G, and/or ordaining the welfare attorney to be supervised by the LA. The Sheriff can also request the attorney reports to the Court how they have exercised their powers and has the authority to revoke any of the powers or the appointment of the attorney.

In general, the Local Authority has no responsibility for the supervision of Welfare or Continuing Attorneys. However, social work practitioners may become aware of concerns in relation to an Attorney's performance/conduct. In such cases, Adult Support and Protection procedures should be followed, which could result in an ASP case conference to detail protective measures and actions.

Further action could include an AWI case conference involving a Mental Health Officer and Legal Services to consider whether an application should be made with a view to Local

Authority supervision. This would, however, imply at least some measure of compliance from the Attorney. The Local Authority may consider that an application for Guardianship would be more appropriate. Much will depend on the circumstances and urgency of the Adult's situation.

## **15.2 Investigation of Welfare Attorneys**

The Local Authority has a duty to receive and investigate all complaints in relation to Welfare Attorneys and the exercise of their powers. Complaints may come to social work teams from any source, with either a personal or professional connection to the Adult.

A chronology of significant events should be compiled and maintained by the social work practitioner, which will inform assessment and discussions in relation to adult protection, and any further measures under AWI legislation.

## **15.3 Removal of Attorney**

If compliance with supervision requirements on the part of the Attorney is an issue, the Local Authority may make an application for Guardianship, the granting of which would end the Attorney's powers, and in the case of neglect or ill-treatment may take action under Adult Support & Protection (Scotland) Act 2007 or, Mental Health (Care & Treatment) (Scotland) Act 2003 measures.

## **15.4 The Role of the Mental Welfare Commission**

If there is mental disorder, the social work practitioner should inform the Mental Welfare Commission in writing of the concerns, although it will only investigate a complaint if it is not satisfied with the outcome of the Local Authority investigation.

## **15.5 Resignation of a Power of Attorney**

A registered Continuing or Welfare Attorney who wishes to resign must give notice in writing to the Adult (granter), and the Public Guardian. Such a resignation does not have effect until the expiry of a period of 28 days commencing with the date of receipt by the Public Guardian. When the Welfare Attorney's 28-day resignation period comes to an end, the Public Guardian must notify the Local Authority and the Mental Welfare Commission accordingly. (*Section 23 Adults with Incapacity (Scotland) Act 2000*)

# **16. The Supervising Officer/Delegated Officer – LAWG**

## **16.1** When the Chief Social Work Officer is appointed as Welfare Guardian, the functions and duties of Guardian are delegated to Highland Council or NHS Highland social worker. The social worker will be the supervising officer of the Adult.

Adults subject to a LA Welfare Guardianship Order must have a Supervising Officer at all times. It is the responsibility of the Team Manager to allocate the case to a social worker and if unable to allocate, the Team Manager will be Supervising Officer by default.

It is the responsibility of the supervising officer/ social worker to inform the adult, the MWC (in cases of mental disorder) and the MHO service administrator of their contact details. This notification must be undertaken within 7 working days of the order being granted, using the appropriate template letter (Appendix 2) unless the Sheriff has directed the adult should not be notified.

## **16.2 Notification of Change of Address**

Once an Order is granted any change of the Adult's address must be notified to the Mental Welfare Commission by the Supervising Officer.

## **16.3 Supervising Officer's Duties**

The Adult subject to LA Welfare Guardianship must be visited by the Supervising Officer within 3 months of the Order being granted and thereafter, at least once within 12 months of the Order being granted.

When reviewing the order, supervising Officers must address the question whether the Order is still required or whether a less restrictive measure is more appropriate. For example, where an Adult has been placed in a care home under a Guardianship Order and has settled well into the establishment, can their needs now be met under less restrictive measures?

The responsible officer should complete the AWI guardianship review documentation on the social work data base.

# **17. Renewal of Guardianship**

## **17.1 Timing of Renewals**

NHSH or Highland Council, where appropriate, has a duty to apply for renewal of Guardianship if nobody with an interest is doing so or is suitable and if renewal is necessary (**NB:** This also applies in cases where the original application was not made by the Local Authority).

A renewal application can be made any time prior to the expiry of the Order. Providing that the papers are lodged at Court before expiry, the previous Order will remain in force until the application is determined. If the Order has expired a new application must be made.

**LAWG** - The Social Work Team Manager and/or Social Worker/ delegated guardian must inform the MHO Service administrative assistant **minimum of three** months prior to the expiry of the LAWG order whether it is to be renewed, to enable assessments and reports to be completed to accompany the renewal application.

If LAWG order is not being renewed, the MHO service and legal service should be notified in writing. The social work team manager or delegated guardian should also inform the CSWO of the final decision.

**PWG** - In relation to private guardianship orders, the supervising officer should discuss with the Guardian(s) whether they intend to make an application for renewal. If the PWG does not wish to renew the order but legal measures are still deemed necessary to support decision making, then an urgent referral should be made to MHO service and Legal services, for consideration of a LAWG application.

A formal Case Conference is not necessary, but the renewal should be discussed as part of an AWI guardianship review, with discussion clearly evidencing whether the order is still necessary and whether the powers are still appropriate and required, and any variation or additional powers identified. This information should be part of the referral to MHO and legal services.

## **17.2 Required Reports**

Where the Local Authority is the applicant, the Mental Health Officer must inform Legal Services that renewal is required and submit to Legal Services the appropriate reports **at least** 10 days before the date of the Expiry of the Order.

A report is written by a Mental Health Officer, supported by one medical report written by a medical practitioner (Section 22 qualified). If the Adult has communication difficulties, a Chief Social Work Officer Report is required (this is delegated to an NHS Highland Adult Social Work professional). [AWI \[6\]](#)

The Chief Social Work Officer's Report is completed by the Supervising Officer on the appropriate form. The report gives an opinion as to the appropriateness of continuing the Guardianship, based on an interview and assessment of the Adult not more than 30 days prior to lodgement, and the suitability of the applicant to continue to be the Adult's Guardian (Private Applications only).

In cases of renewal of Financial Guardianship, a report will be required from the Public Guardian as to the conduct of the applicant as the Adult's Guardian and their suitability to continue to be appointed.

## **18. Transfer of individuals under Local Authority Guardianship**

Where the Chief Social Work Officer is the Guardian and the Adult changes their habitual residence to another Local Authority, the CSWO of Highland must advise the CSWO in the receiving local authority of the adult's legal status. The receiving CSWO then becomes the adult's welfare guardian.

In Highland, this notification is sent by the MHO service on behalf of the CSWO. The delegated guardian must write to the MHO service to inform them of the adult's change in habitual residence. This information should include, the adult's full name, date of birth, current/ new address, date of transfer. The order should have been recently reviewed and the supervision notes and interlocuter provided.

## **19. Non-compliance with the decisions of the Welfare Guardian**

- 19.1** Non-compliance by the adult with the Welfare Guardian can take place in many different forms, this section relates to serious, significant or persistent non-compliance which has the potential to cause detriment to the Adult's welfare e.g. where the adult's needs cannot be met in the community and a care home placement is required but the adult is refusing to go into Long Term Care or non-compliance with the Guardian may happen if an adult refuses care and support services to meet their needs.

The guardian should make it clear to the Adult that the care plan is a professional assessment of their needs, to safeguard them from harm and that the decision has legal authority. If the Adult cannot or will not engage/comply to the extent that a care plan breaks down the Guardian may require use section 70 to enforce the Guardianship powers. (see S 19.2)

A process of persuasion must take place.

Initial steps to take:

- Ensure all informal measures have been tried, e.g. discussion with adult, seek support from family/friends/carer/provider
- Use communication aids to support discussion, e.g: story boards, use of easy read guides, written and or visual information.
- Discuss concerns with line manager and agree actions
- Contact MHO/Legal service for advice and guidance
- Arrange AWI review discussion – which could inform further actions, e.g: seek “Non-compliance with decisions of guardian with welfare powers” (S70 of the 2000 Act) (See 6.61 [Non-compliance](#) in Code of Practice)

## 19.2 Section 70 Orders

Can give the Guardian authority to remove an Adult from their own home and move them to a Care Home by granting:

*(a) an Order ordaining the Adult/person to implement the decision of the Guardian; or*

*(b) a Warrant authorising a Constable to enter the Adult’s premises and apprehend the Adult and remove him to the place specified by the Guardian.*

Applications for such Orders or Warrants will, following consultation with the Guardian, be made by Legal Services.

Under the Adults with Incapacity (Scotland) Act 2000 the Sheriff has to allow objections to be heard, but the Sheriff has power to dis-apply or modify the application insofar as it requires objections to be heard. In cases of extreme risk or urgency these could be dispensed with.

## 19.3 Situations of Risk and Urgency

In cases where the Adult is at serious risk if left in their own home other measures under Adult Support & Protection (Scotland) Act 2007 or the Mental Health (Care & Treatment) (Scotland) Act 2003 should be considered. Such cases should be discussed with Legal Services and Mental Health Officer Service as a matter of priority.

# 20. Medical Treatment of Adults Who Lack Capacity

## 20.1 Urgent Treatment

A medical practitioner may treat a patient when no consent has been given under “Common Law” and only in the circumstances where urgent treatment is necessary for the preservation of the Adult’s life or for the prevention of serious deterioration in his/her medical condition.

## 20.2 Section 47 Certificate

When an Adult cannot give informed consent to medical treatment there **must** be legal authority to give that treatment.

Relatives can sometimes mistakenly believe that they can consent to treatment on their relative’s behalf, this is not the case. Relatives or interested parties must have legal decision-making authority, be authorised by a Power of Attorney, Intervention order or Guardianship order, in relation to medical treatment.

Part 5 of the Act gives a general authority to Medical Practitioners to treat Adults who are incapable of consenting to the treatment in question. Medical Practitioners will be responsible for determining incapacity and for the issuing of the medical certificate confirming incapacity. [MWC - Treatment under S47 of the AWI Act](#)

The Medical Practitioner's decision is always subject to a right of appeal to the Sheriff. Appeal can be instigated by the Adult or anyone who can claim an Interest in the adult's welfare or medical treatment. Common Law gives authority to give life-saving treatment to patients who cannot consent. The Act makes no change to this position.

The Act is concerned only with non-emergency treatment and defines medical treatment as 'any procedure or treatment designed to safeguard or promote physical or mental health'.

### **20.3 Who has Authority to Treat?**

The Medical Practitioner primarily responsible for the treatment and any other person authorised by the S47 certificate has authority to treat. [MWC - Right to Treat?](#)

Before the Medical Practitioner's authority to treat, a certificate must be completed to the effect that the patient is incapable of giving consent to the treatment in question. A medical certificate (S47) can be valid for up to three years. There could be more than one certificate in place at any one time.

The Medical Practitioner's general authority to treat an adult will not apply where a 'proxy' has been given authority to consent to treatment on behalf of the Adult, e.g. a Welfare Attorney, Welfare Guardian or someone authorised under an Intervention order.

Where a proxy has been appointed the Medical Practitioner is obliged to seek that person's consent as far as is reasonable and practicable before giving the treatment.

Under Section 47 of the Adults with Incapacity (Scotland) Act 2000, a medical practitioner primarily responsible for the medical treatment of the Adult (the GP in the community or a hospital doctor for inpatients) must issue a Section 47 certificate stating that they are of the opinion that the Adult is incapable in relation to decisions about medical treatment.

The certificate must be accompanied by a treatment plan which should be sufficiently detailed to provide for all day-to-day medical treatment that the Adult may need.

All persons authorised to treat under Section 47 certificates under the Act are bound by the principles of the Act.

Treatments for mental disorder which fall within the scope of the Mental Health (Care & Treatment) (Scotland) Act 2003 are specifically excluded from a Section 47 certificate. Surgeons and anaesthetists will usually prefer to issue their own certificate for surgical procedures.

The Section 47 authority to treat may be delegated to other practitioners such as dentists, physiotherapists, speech therapists who must seek the Responsible Medical Officer's approval for any actions.

In practice, many adults suffering from dementia are routinely treated in residential establishments without the lawful authorisation of a certificate. It is the province of GPs whether or not they issue such certificates, but health and social work staff should be

mindful of the legal necessity to do so in their dealings with Care Homes/Residential establishments.

A Section 47 certificate is valid for up to three years depending on the condition and circumstances of the Adult.

It does **not** authorise the use of any kind of force or coercion in the giving of medical treatment unless there are exceptional circumstances.

It does not authorise the admission of the Adult to hospital for treatment of mental disorder **against the adult's will**. The Mental Health (Care & Treatment) (Scotland) Act 2003 must be used in this instance. However, in situations where an Adult lacks capacity to give informed consent to such hospital admission, a Welfare Proxy may place in hospital (informal admission) a patient who gives no indication of disagreement or resistance.

Where there is a Proxy with relevant powers, the authority under Section 47 only applies if the medical practitioner is unaware of the appointment of a Proxy being authorised to consent to medical treatment, or the medical practitioner has failed to obtain the consent of the guardian, welfare attorney or person authorised under the intervention order because it was unreasonable and impracticable to do so.

Where the Chief Social Work Officer is Guardian a Section 47 certificate will be required for any decisions about medical treatment.

An Intervention Order may authorise one single health care intervention.

Medical powers may encompass decisions to refrain from acting, as well as to act, for example deciding whether or not to resuscitate.

Welfare Guardians and Attorneys exercising a power over medical treatment are bound by the principles to take account of the Adult's past wishes, e.g. an Adult who is a lifelong Christian Scientist would not wish to have medical treatment, and a Welfare Attorney would be bound by this should the need arise. In all that they do Welfare Proxies are accountable to the law and may have to account for their decisions in court.

For further guidance please see MWC practice guidance reports section:

[www.mwcscot.org.uk](http://www.mwcscot.org.uk)

[www.mwcscot.org.uk/publications](http://www.mwcscot.org.uk/publications)

## **20.4 Disagreement with a Welfare Proxy's Use of Medical Powers**

Where there is disagreement between the Responsible Medical Practitioner and the Proxy or any other party with an interest, appeals can be made to the Sheriff by the doctor under Section 52, or any interested party (can be the Local Authority) under Section 3(3) against the decision of the Welfare Proxy. If there is still no agreement it may be further appealed to the Court of Session as to whether treatment should or should not be given. A Section 47 certificate may **not** be issued until the appeal is heard but treatment can be carried out under Common Law where the delay would endanger an adult's health (the principle of necessity).

Where an application for an Intervention or Guardianship Order has been made but not yet determined, or an appeal is in process and a doctor is giving treatment under the Common Law's principle of necessity, they are bound to comply with the Section 1, principles of the Adults with incapacity (Scotland) Act 2000.

## **20.5 Revocation of Section 47 Certificate**

A doctor is under obligation to revoke a Section 47 certificate where the Adult's condition has changed, and it is no longer warranted.

## **21. Adults at risk who lack capacity**

Please refer to: [Adult Protection | NHS Highland \(scot.nhs.uk\)](https://www.scot.nhs.uk/adult-protection/)

## **22. Appendices**

### **Appendix 1 – Decision Specific Screening Tool**

### **Appendix 2 – Letter templates**

- T1 – Notice to the Adult re: First order granted
- T2 – Notice to MWC re: First order granted
- T3 – Notice to Adult re: final order where interim order previously granted
- T4 - Notice to MWC re: final order where interim order previously granted
- T5 – Notice to OPG re: LAWG change of address TO Highland Council
- T6 – Notice to MWC re: LAWG change of address TO Highland Council
- T7 – Notice to Adult re: change of address TO Highland Council
- T8 – Letter to PWG in relation to Supervision duty
- T9 – Letter re: delay in PWG application and LAWG application being pursued

\*Transfer out letter from CSWO to new L.A. (sent by MHO Service on request)

### **Appendix 3 – Highland AWI Referral Form**

### **Appendix 4 – Standard Operating Procedures (S.O.Ps)**

- S.O.P – AWI admission to Hospital & Legal Authority
- S.O.P – Clarification of Legal Status
- S.O.P – AWI & CareFirst Recording
- S.O.P – S13ZA
- S.O.P – AWI Case Conference
- S.O.P – AWI Private Guardianship
- S.O.P – AWI Guardianship & Supervision
- S.O.P – AWI & Finance – L.T.C

### **Appendix 5 – S13ZA Procedures**

### **Appendix 6 – S13ZA Checklist**

### **Appendix 7 – AWI Case Conference**

- AWI CC Report Template
- AWI Aide Memoir for Chair
- AWI CC Agenda Template
- AWI CC Minute template